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ABSTRACT

This paper discusses how procedural due process as used by school boards can help make court appearances less likely. While substantive due process speaks to the content or subject matter of the law, the "what," procedural due process examines the manner of the application of the law, the "how." Procedural due process is defined as an orderly proceeding adapted to the nature of the situation in which a person is entitled to notice and an opportunity to be heard. The paper discusses teacher tenure and procedural requirements for tenure termination. It suggests that administrators set the stage before the need arises for due process procedure, namely, inform the teachers, evaluate them, and go over the applicable policies. Procedural due process requirements for classified school employees, students, and exceptional children are also mentioned. The paper concludes by emphasizing the importance of local boards of education establishing and following due process procedures of notice and an opportunity to be heard. (Author/ID)

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WILL YOUR DUE PROCESS PROCEDURE KEEP YOU OUT OF COURT?

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Presumably you are here to find out whether due process procedures keep you out of court. The answer to that is, probably not. If that is all you wanted to know or get from this clinic session, you may leave now. However, that is not all that I wanted to share with you.

As I reviewed the other many topics for the clinics which are to be held at this convention, I could not help but glean that this clinic is one of a few "legal" oriented sessions. I hope you are interested in school law. That area of law is my primary responsibility in the Office of the Attorney General for the Commonwealth of Kentucky.

I certainly do not desire to drone on in "legalese" this morning; but if we are going to attempt to look at what due process procedures can do for you, we must start out by seeing what it is we are working with.

The phrase "due process of law" comes to state school systems from the 14th Amendment of our United States Constitution. The pertinent language of the 14th Amendment is pretty sparse. It reads:

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"Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Just like in Kentucky's Constitution, there is undoubtedly a section in each of your state's constitutions which requires due process of law. Still, from these constitutional words alone we do not know what is meant by "due process." The fact is, the term "due process of law" is not susceptible at exact definition. This phrase, as we will discuss later, has taken on meaning through a development in court cases.

In the course of developing the meaning of "due process," the courts have brought within the term the concept of substantive as well as procedural rights. You may have heard or read of "substantive due process" and "procedural due process." When applied to substantive rights, due process is interpreted to mean that the state or its entities, such as a school board, are without a right to deprive a person of life, liberty or property by an act, a policy, a regulation that has no reasonable relation to any governmental purpose, or which is so unnecessary such as to be an arbitrary or capricious act. Thus, the constitution protects an individual's life, liberty or property interests from arbitrary and unreasonable actions. A teacher, for example, has a life interest in pursuing an avocation on their own time;

a local board could not avoid substantive due process problems if it by policy forbade teachers from being members of a rock band. Teachers have a liberty interest in their good reputation, or a liberty interest in the length of their hair. Through board action, these constitutionally protected interests may not be taken arbitrarily away under substantive due process. Procedural due process, on the other hand, is an orderly proceeding adapted to the nature of the situation in which a person is entitled to the notice and an opportunity to be heard. You cannot quantify procedural due process; the core of procedural due process is flexibility. Sometimes the courts talk of rudimentary procedural due process and at others full, adversary due process; the procedural due process due varies with the circumstances extant about which one is concerned. As a rough rule of thumb, the greater the protected right or interest at stake, the greater and more formal will be the procedural due process which is due. Basically, then, substantive due process speaks to the content or subject matter of the law, the "what," while procedural due process examines the manner of the application of the law, the "how."

Enough of trying to explain what is due process. Unquestionably, substantive and procedural due process are critical factors in many areas of school law today. While a local board wants to be careful to take into consideration substantive due process rights in the development of its actions and policies and regulations, procedural due process will be of more concern to local school boards. I want to go over several areas of conceivable concern and discuss with you the way due process plays a significant part and how due process procedures will help you -- maybe not in staying out of court entirely, but will help make court appearances less likely and serve you well if you get into court.

The first area I want to look at in regard to due process procedures is school personnel. Many states have tenure laws. Under these laws a teacher who has rendered teaching services for a statutorily provided number of years in the same school system is eligible for tenure. With tenure goes a property interest, a right of expectation of reemployment each year in the school system. This property interest may be taken away from a teacher only upon the following of some quantum of procedural due process and only upon the basis of some legal, statutorily stated cause, such as insubordination, immorality, incompetency or neglect of duty. As a usual matter

a teacher with tenure may not have that property interest terminated without a formalized application of due process procedures. By way of example, a typical tenure termination statute requires before a teacher could be terminated the teacher is to have been given prior notice of deficiencies and an opportunity to correct them; if subsequently decided to terminate, the teacher would be entitled to be furnished with a written statement specifying in detail the charge or charges against the teacher and then provided a full hearing before the board with the right to confront witnesses, cross-examine, etc., to defend against the charges. Notice and an opportunity to be heard is the key. Again, the purpose of procedural due process is to convey to the individual a feeling that the state or school board has dealt with him or her fairly, as well as to minimize the risk of mistaken deprivations of protected interests. For teachers who have not gained the tenure status, they are usually employed from year to year. The United States Supreme Court has said that such nontenured teachers do not have a property interest protected by the constitution and therefore only abbreviated due process procedures are required. Absent state provisions to the contrary, in informing a nontenured teacher they will not have a teaching contract for the following school year.

A typical nontenure teacher statutory requirement for nonrenewal of a contract is for a local board of education to give notice in writing of nonreemployment by a specified date and if the teacher receiving a notice so requests it, usually a written statement from the local board of education giving the specific, detailed and complete grounds upon which the nonrenewal of the contract was based. Unless otherwise provided by state law, there is no entitlement to a hearing for the nontenured teacher who is not reemployed. An exception exists to the no-hearing requirement in the nontenured teacher situation. If the reason for the nonrenewal of the contract creates a "badge of infamy," a hearing is required for the limited purpose of affording the teacher an opportunity to clear his or her name. By "badge of infamy" it is meant those reasons that reflect upon ones reputation or that are so stigmatizing as to effectively preclude future employment.

In some states' laws there are also due process procedures spelled out for demotion from particular positions in a school system, especially administrative positions. For example, in Kentucky we have an administrator's fair demotion law which protects one holding an administrative position after three years of administrative service. A formal due process hearing before the board is required after a written statement

of grounds for demotion have been provided to the administrator.

I am aware that some states have gotten away from tenure provisions. Nevertheless, teachers are entitled to be treated fairly, to notice, and usually some form of opportunity to be heard. Remember the procedural protection to be afforded to certified school personnel will correspond to the teacher's job security, the property interest, under state law.

Irrespective of what kind of teacher law your state may have, I believe it paramount that each local board adopt policies relating to certified personnel, including policies on hiring, assignment, transfer, dismissal, suspension, reinstatement, promotion, demotion and also evaluation procedures. The stage must be set before there is a need to apply due process procedures: inform the teachers, evaluate them, go over the applicable policies. Having, and most importantly the following of, such policies in conjunction with any applicable state school laws will be, in all likelihood, all the due process procedures you will need.

As for classified school employees, unless otherwise provided by state law, the due process that is due is minimal. Such employees are usually hired by the hour or school year. Unless given to them by state law, these employees have no

property interest requiring application of due process procedures. Timely notice of termination usually is all that is required. I believe it advisable to develop local board of education policies regarding classified personnel.

The second basic area in school law about which we must discuss due process procedures is in regard to students. The growing assessment by the courts of when and how much due process is due to students under varying circumstances has been called by some as creating a growth industry.

Due process procedures concerning disciplinary actions must be developed by boards of education. It is a good idea for boards of education to consider promulgating a code of student rights and responsibilities. Such code may address, for example, students' right of expression, rights regarding grades, access to records, freedom from abuse and disciplinary measures. We know that students do not shed their constitutional rights at the schoolhouse gate. Therefore school boards must act and respond accordingly.

There must also be a growing awareness of due process rights in regard to students' curriculum programs, especially for exceptional children. School boards need to develop due process procedures generally in this area and specifically as to hearings where identification, evaluation, or placement of a child may be in issue.

The importance of each local board of education to establish and follow due process procedures of notice and opportunity to be heard cannot be overemphasized. Work at home in your school system with legal counsel on this matter. These due process procedures need to be flexible to the situation under consideration. Remember the greater the right or interest involved, the greater is the need for fuller due process procedures. As the Constitution requires, no man should be deprived of life, liberty or property without due process of law.

Thank you for your time and attention.